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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN B. TOOMEY,

Petitioner,

v.

ANDREW J. WHELAN AND EDWARD T. WHELAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE R. KUCIK*
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QUESTION PRESENTED

Under applicable substantive law, a corporate shareholder may not pursue a direct action to recover damages for a loss of share value derived from injury to the corporation that issued the shares. The district court, applying that rule of law, dismissed portions of respondents' claims, and the court of appeals reversed. The question is whether the court of appeals erred in holding that, before a district court may dismiss a shareholder action that fails to state a claim for relief because of that rule of law, the court is required by Rule 17(a), Fed.R.Civ.P., to allow "a reasonable time . . . for ratification of commencement of the action by, or joinder or substitution of," the corporation.

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ANDREW J. WHELAN and EDWARD WHELAN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner John B. Toomey respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 953 F.2d. 663, at 293 U.S.App.D.C. 267 and at 21

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[1] The parties to this proceeding are John B. Toomey, Petitioner-Defendant; Tyler Abell, Defendant; Estate of Anthony Chase, Defendant; Andrew J. Whelan, Respondent-Plaintiff; Edward T. Whelan, Respondent-Plaintiff.

Fed.R.Serv. 3d 1273 and is reproduced in the appendix, *infra*, pp. 1a-22a. The orders of the court of appeals denying rehearing *en banc* and granting in part and denying in part a petition for rehearing are not reported, but are reproduced in the appendix, *infra*, pp. 23a-24a and pp. 25a-27a, respectively. The order of the court of appeals denying petitioner's motion for reconsideration of the court's denial of a portion of the petition for rehearing is unreported, but is reproduced in the appendix, *infra*, pp. 28a-29a. The memorandum and order that accompanied the judgment of the United States District Court for the District of Columbia is not reported, but is reproduced in the appendix, *infra*, pp. 30a-37a.

GROUNDS FOR THIS COURT'S JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on January 17, 1992. The court's order granting in part and denying in part petitioner's petition for rehearing was entered on March 30, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The Rules Enabling Act, as amended, 28 U.S.C. § 2072, reads in pertinent part as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts . . . in civil actions . . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right . . . .

Rule 17(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Every action shall be prosecuted in the name of the real party in interest .... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

STATEMENT OF THE CASE

Animated Playhouses Corporation (APC) was incorporated in 1981 to develop what its promotors projected would be a chain of more than 200 new "family entertainment" restaurants. Petitioner John B. Toomey (Toomey) was an investor in APC's first restaurant. Respondents Andrew J. Whelan and Edward T. Whelan (the Whelans) developed the APC business plan and were instrumental in attracting investors. They also managed the company and were minority shareholders in APC.

APC and its restaurant plan were not successful. By the end of 1983, after more than two years of operation, APC had opened only seven restaurants and had lost invested and borrowed funds of more than $6 million. Tr. E-1, p.74, 90-91. Seven months later, in July 1984, APC filed for liquidation under Chapter 7 of the Bankruptcy Code.

Toomey and two other investors sued APC and the Whelans in March 1984, alleging that they had fraudulently promoted the company by using spurious revenue projections and misrepresentions of APC's ability

to execute its business plan. In February 1985, that lawsuit was dismissed by stipulation.

The instant litigation was commenced by the Whelans two years later, in February 1987. An important element of the over $35,000,000 in damages sought was an alleged loss in value of the Whelans' APC shares. The Whelans claimed that that loss occurred because the lawsuit Toomey and others brought in 1984 prevented APC from obtaining capital needed for its survival. Toomey—both in a motion to dismiss the complaint and in his pretrial statement, filed some ten months before the trial—specifically contended in the district court that the Whelans had no standing to sue for the derivative loss they alleged in the value of their APC stock. On the third day of the trial, the district court granted Toomey's motion *in limine* based upon the same contention. In a subsequent memorandum and order, the district court explained its ruling as follows:

> In mid-trial the Court ruled that the Whelans themselves, whether as officers or stockholders, lacked standing to maintain APC's claims vicariously even though their own investments in the corporation decreased in value, and could recover, if at all, only for lost business opportunities personal to them, as distinct from APC's corporate claims.
>
> * * *
>
> The Court based its decision on case law holding that a cause of action for damages for injury to a corporation belongs solely to the corporation and cannot, in the circumstances, be enforced by the shareholders. *See Cowin v. Bresler*, 741 F.2d

410 (D.C. Cir. 1984); *Nagle v. Commercial Credit Business Loans, Inc.*, 102 F.R.D. 27 (E.D.Pa. 1983). (The Whelans did not bring this action as a derivative suit.)

Appendix, p. 32a (including n.2).

The court of appeals misconstrued the district court's ruling on the Whelans' stockholder claims and deemed the ruling based upon a determination that the Whelans were not real parties in interest. Appendix, p. 14a Without resolving the question whether the Whelans were "real parties in interest," the court of appeals overturned the ruling. The court held that, under Rule 17(a), Toomey had waived any contention that the Whelans were not "real parties in interest" because Toomey had not challenged the Whelans' right to recover the lost value of their APC shares "until the trial was underway." Appendix, p. 16a. The court of appeals' application of Rule 17(a) was based upon its holding that the question whether "the suit" may be maintained by the Whelans or APC "really depends . . . on considerations and conventions of corporate law . . . which we think are brought into play under Rule 17(a) of the Federal Rules of Civil Procedure."Appendix, p. 15a. Toomey, in his appellate brief and his petition for rehearing, maintained that "[t]he real party in interest doctrine does not govern the shareholder recovery issue" and consequently any timeliness requirements in Rule 17(a) were irrelevant. Final Brief for Appell, filed December 27, 1990, at p. 17; Appendix, pp. 38a, 43a-46a.

REASONS FOR GRANTING THE WRIT

The court of appeals' misapplication of Rule 17(a) in the circumstances of this case presents an impor-

tant question concerning the lawful power of a federal court to reach by indirection a result that could not be prescribed by the federal rules of civil procedure. By erroneously applying Rule 17(a) to circumstances that are not governed by the rule, the court of appeals erroneously held Toomey to procedural requirements that have no bearing on this case. Then, by holding that Toomey did not satisfy those inapplicable requirements, the court erroneously permitted the Whelans to pursue a cause of action that is denied them under a rule of substantive law first followed by this Court over a century ago in *Hawes v. Oakland*, 104 U.S. 450 (1882) and followed generally throughout the United States. 12B Fletcher, Cyclopedia of the Law of Private Corporations § 5911 (1984).

That misuse of procedural rules to enlarge substantive rights is beyond the courts' procedural rulemaking power, which may not be used to "abridge, enlarge or modify any substantive right. . . ." Rules Enabling Act, as amended, 28 U.S.C. § 2072. That limitation has particular significance in diversity cases, in which State law is the sole arbiter of the parties' substantive rights.

In the instant case, the district court, following the previous decision of the court of appeals in *Cowin v. Besler*, 741 F.2d 410, 414-416 (D.C. Cir. 1984), held that the circumstances alleged by the Whelans did not state a claim for which relief could be granted. The *Cowin* rule, since confirmed in *Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990), reflects a substantive rule of law that has been recognized as controlling by every federal court of appeals that has

addressed the point.[2] And except for the ruling below, no federal court of appeals has circumvented the substantive law barring stockholder recovery for losses due to corporate injury by invoking the "real-party-in-interest" doctrine.

The reason for this consistent line of decisions is not hard to fathom. As the Second Circuit explained in rejecting the application of Rule 17(a) in an analogous context—

> [Plaintiff] and his employer are not merely different parties with the same claim. They are different parties with different claims. Moreover, allowing ratification under Rule 17 would violate 28 U.S.C. § 2072 which provides that federal rules of court "shall not . . . enlarge . . . any substantive right."

Del Re v. Prudential Lines, Inc., 669 F.2d 93, 97 (2d Cir.), *cert. denied*, 459 U.S. 836 (1982).

Similarly, the Whelans and APC are not different parties with the same claim. They are different parties with different claims—even though the Whelans'

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[2] *See Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30 (1st Cir. 1987); *Papilsky v. Berndt*, 466 F.2d 251, 255 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Kauffman v. The Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Semida v. Rice*, 863 F.2d 1156, 1161-62 (4th Cir. 1988); *Adams-Lundy v. Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Gaff v. F.D.I.C.*, 814 F.2d 311, 315 (6th Cir. 1987); *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *EMI Limited v. Bennett*, 738 F.2d 994, 996-998 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *Warber v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

claims are derived from the alleged corporate injury on which APC's claim would be based. The Whelans seek to recover for themselves only damages represented by an alleged loss in the value in their own APC stock. Rule 17(a), properly construed, has no application to the Whelan's claims.

The portion of the rule that the court of appeals invoked reads as follows:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

The plain words of that provision cannot be applied to the circumstances of this case. APC was able to assert only its own claims for injury it has suffered. It could not by ratification legitimize the Whelans' claims for losses in their share value, because stockholder claims of the kind the Whelans have asserted are not recognized under applicable substantive law—whether ratified by the corporation or not. Likewise, APC could not intervene to assert the Whelans' claims or substitute itself for the Whelans. Accordingly, there was no reason for the district court to allow time for APC to act under Rule 17(a) before dismissing the Whelans' claims, and there is no basis for the holding of the court of appeals that Toomey's motion *in limine* was not timely.

The rule cannot be invoked, as it was below, to vest federal litigants with causes of action that applicable substantive law denies them, because the rule

cannot lawfully be construed, to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1982). *see Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 544 n. 2 (1984) (Stevens, J., concurring). The substantive law, as the district court correctly held, does not recognize the stockholder claims the Whelans brought in this case. The court of appeals' misapplication of Rule 17(a) displaces that rule of substantive law and allows the Whelans to pursue claims that do not exist.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 29, 1992

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 10, 1991 Decided January 17, 1992

No. 90-7016

ANDREW J. WHELAN, et al.,
APPELLANTS

v.

TYLER ABELL, individually, and as a member of the law firm of Bregman, Abell & Kay, et al.

No. 90-7017

ANIMATED PLAYHOUSES CORPORATION, et al.,
APPELLANTS

v.

TYLER ABELL, individually and as a member of the law firm of Bregman, Abell & Kay, et al.

No. 90-7018

ANDREW J. WHELAN, et al.,
APPELLANTS

v.

TYLER ABELL, individually, and as a member of the law firm of Bregman, Abell & Kay, et al.

Appeals from the United States District Court
for the District of Columbia

(87cv01763, 89cv01625 and 87cv00442)

Loren Kieve for appellants. *Thomas Carroll* also entered an appearance for appellants.

George R. Kucik, with whom *Michael E. Jaffe and Gerald Zingone* were on the brief, for appellee John B. Toomey.

Nelson Deckelbaum and *Arthur G. Kahn* were on the brief for appellee Tyler Abell.

William A. Hylton, Jr. was on the brief for appellee Estate of Anthony Chase.

Before: RUTH B. GINSBURG, SILBERMAN, and THOMAS,* *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: These consolidated cases arise out of the failure of Animated Playhouses Corporation (Corporation), a restaurant chain founded by appel-

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*Former Circuit Judge Thomas, now an Associate Justice of the Supreme Court of the United States, was a member of the panel when the case was argued but did not participate in this opinion.

lants Andrew Whelan and Edward Whelan. Appellees Tyler Abell, Anthony Chase,[1] and John Toomey purchased one of the Corporation's restaurants and brought legal actions against the Whelans and the Corporation regarding misrepresentations allegedly made during the purchase negotiations. These actions concluded without determination of liability. The Whelans then sued Abell, Chase, and Toomey, charging them with a number of common law torts, including malicious prosecution and abuse of process. The district court ruled against the Whelans on all counts. The Whelans raise numerous challenges to the district court's decisions.[2] We affirm two of the challenged rulings, reverse the others, and remand for further proceedings.

I.

A.

The Whelans, who were major investors in and senior officers of the Corporation,[3] planned to develop a nationwide chain of family entertainment restaurants featuring three-dimensional animated characters. In 1982, they sold to Abell and Chase the Corporation's first restaurant located in Putty Hill, Maryland. Shortly thereafter, Abell and Chase sold a one-third interest in their investment

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[1]Anthony Chase has died, and his estate is an appellee in this case. We will refer to both as "Chase."

[2]We assume that District of Columbia law applies to appellants' common law claims. In their arguments to the district court, the parties relied primarily on District of Columbia law, and the district judge concluded that the parties had agreed that District of Columbia law governed.

[3]The Corporation established two subsidiaries, Animated Entertainment Systems Corporation and Captain Andy's River Towne Corporation, to operate the entertainment and restaurant businesses. All three companies are appellants in one of the consolidated cases before us. We will refer to the Corporation singly and together with its subsidiaries as "Corporation."

to Toomey, referring to their partnership as ACT Associates (ACT).[4]

The Putty Hill restaurant as well as the chain as a whole proved unsuccessful. The parties hotly contest the cause of the business' failure, but it is undisputed that once the business' problems became apparent, ACT attempted to force the Whelans and the Corporation to make large payments to the partners. ACT threatened the Whelans with legal action over alleged illegalities committed during the 1982 negotiations for the Putty Hill restaurant if the Whelans did not agree to take certain actions. ACT demanded that the Corporation buy back the restaurant and assume the debt the partners incurred to finance the purchase. ACT further demanded that the Whelans transfer to ACT most of their personal shares in the Corporation. When pressing these demands, ACT pointed out that a lawsuit would seriously impede the Corporation's efforts to raise additional capital and that the Whelans could not afford to litigate. And to make the point more dramatically, ACT also apprised the Corporation's major investors of the potential litigation by sending them copies of a letter threatening legal action and a draft complaint.

Eventually the partners carried out their threats. In March 1984 ACT filed a lawsuit against the Corporation and the Whelans (Putty Hill lawsuit), alleging mail and wire fraud, securities fraud, franchise law violations, and racketeering. All of the charges rested on alleged misrepresentations made in the course of the 1982 negotiations. ACT also sent a letter to the Maryland Attorney General's Office in February 1984 claiming that the Corporation and Andrew Whelan violated the Maryland Franchise Disclosure Act, MD. CODE ANN., Art. 56, § 345-365D. The Maryland Securities Commission issued a show cause order, and in November 1984 Andrew Whelan entered

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[4]We will use the acronym "ACT" to refer both to Abell, Chase, and Toomey acting collectively and to one partner acting on behalf of the partnership.

into an "undertaking" with the Commission in which he neither admitted nor denied wrongdoing. The agreement provided that satisfaction of its terms would result in a rescission of the show cause order one year later.

The Corporation and other of the Whelans' business ventures subsequently suffered a string of setbacks. A venture capital firm on the verge of injecting large amounts of capital into the Corporation withdrew, and the Corporation filed for bankruptcy in July 1984; a separate venture involving a network of walk-in medical clinics failed; the Whelans were forced to relinquish most of their holdings in a pharmacy venture; and Andrew Whelan was unable to secure franchise rights in an unrelated restaurant business when his net worth declined below the franchisor's minimum requirements.

The Putty Hill lawsuit never went to trial. At a status conference, Judge Gesell expressed his belief that ACT had not brought the action in good faith, and he told the partners to "fish or cut bait." Abell and Toomey subsequently moved to dismiss the Whelans from the case in October 1984. Judge Gesell dismissed the suit against the Whelans in February 1985, and he dismissed the rest of the case in 1986.

In December 1984, however, ACT had filed a second lawsuit on essentially the same claims against the lawyers who had represented the Whelans and the Corporation during ACT's acquisition of the Putty Hill restaurant. After a bench trial, Judge Gesell dismissed that case with prejudice. He found that

> plaintiffs [Abell, Chase, and Toomey] have failed to prove their claims. Neither defendant individually nor in association with others engaged in any fraudulent act or misrepresentation, intentionally or otherwise. In their dealings with plaintiffs, each defendant made full disclosure of facts known to them and did not omit to state any material fact.

Abell v. Elmer, 1990 Fed. Sec. L. Rep. (CCH) ¶ 92,448, at 92,731 (D.D.C. 1985). He also described the suit as

"nothing more than a desperate attempt by disappointed investors to create a cause of action where none exists." *Id.* Relying in part on Judge Gesell's decision, Andrew Whelan sought rescission of his undertaking with the Maryland Securities Commission. The Commission vacated the undertaking in November 1985 "in accordance with [its] terms."

B.

By 1987 the legal actions initiated by ACT were concluded. The Whelans then turned round and sued ACT,[5] charging the partners with tortious interference with prospective business advantage, breach of fiduciary duty, wrongful involvement in litigation, abuse of process, and malicious prosecution. Chase defaulted soon after the suit was filed, and default orders were entered against him. Abell and Toomey, however, persevered in their defense.

Before the case went to trial, the district court denied the Whelans' partial summary judgment motion, which, relying on Judge Gesell's findings in *Abell v. Elmer* that no fraud or misrepresentation occurred during the 1982 negotiations, sought to preclude Abell and Toomey from defending in this action on the ground that their original lawsuit was warranted. The court, on the other hand, granted Abell and Toomey's partial summary judgment motions dismissing the malicious prosecution, abuse of process, and wrongful involvement in litigation claims. Only the tortious interference with prospective business advantage and breach of fiduciary duty claims thus remained.

On the first day of the jury trial, Abell and Toomey moved to bar any testimony concerning the lost value of the Whelans' investments in the Corporation on the ground that only the Corporation itself could recover for

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[5]The Whelans filed identical complaints in the District of Columbia and the District of Maryland. The latter case was transferred to the District of Columbia, where the two cases were consolidated.

such loss. The district court agreed and granted the motion. At the close of the Whelans' case, the court also directed a verdict for Abell and Toomey on the breach of fiduciary duty claim on the ground that only the Corporation could assert claims arising out of that alleged misconduct. These rulings left only the Whelans' tortious interference claim, limited, of course, to the damage inflicted on business opportunities unrelated to the Corporation.

The jury returned a verdict for Andrew Whelan but against Edward Whelan on that sole remaining count.[6] Post-verdict conversations between the Whelans' counsel and several jurors led the Whelans to conclude that the jury had meant to find Abell and Toomey liable to Edward Whelan, too, and had made a mistake in recording the verdict. The Whelans thus filed motions requesting that the court interview the jurors and seeking permission to obtain jurors' affidavits. The court denied these motions. Abell and Toomey moved for judgment n.o.v. with respect to the verdict in favor of Andrew Whelan and that motion was granted. The court also denied the Whelans' post-trial motion to add the Corporation as a plaintiff and dismissed a separate complaint filed by the Corporation to recover on its own behalf. Finally, the court vacated the default orders against Chase and entered judgment in his favor, even though Chase did not participate in the litigation and presented no excuse for his default.

The Whelans appeal the numerous adverse rulings against them, with the exception of the order granting summary judgment on the wrongful involvement in litigation claim.

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[6]In one of its prior rulings, the court bifurcated the trial, limiting the first trial to liability issues.

II.

A.

The district court "determined that it would be procedurally unfair" to accord preclusive effect to fact findings Judge Gesell made in *Abell v. Elmer*. The court stressed that in the prior adjudication, ACT had, and failed to carry, the burden of proof, while in this case, the proof burden had shifted to the Whelans. The district judge also noted the altered character of the proceedings: *Abell v. Elmer* had been a bench trial, while the case at hand, pursuant to the Whelans' demand, would be tried before a jury. Finally, the judge noted that the issues in the two cases were not identical.

While we agree with the Whelans that the two cases present some common issues, we do not regard the district court's ruling as an abuse of discretion, and we therefore affirm the court's judgment on this point. It is true that "'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (D.C. Cir. 1986) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The Whelans, however, who seek to preclude ACT from contesting certain issues based on the prior adjudication in *Abell v. Elmer*, were not parties to that litigation. When a nonparty invokes issue preclusion, considerations may hold sway that would not block preclusion when the second action is between the same parties. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment b (1982).

Cogent precedent supports the position "that preclusive effect should not be given to the first determination when the party sought to be concluded had a heavier burden (or his adversary had a lighter burden) in the first proceeding than in the second." *Id.* § 28 reporter's note at 289 (citing cases). As a counterweight to the proof burden shift present here, the Whelans note that ACT, as plaintiffs in the

Abell v. Elmer action, had both the incentive and the opportunity to litigate with undiluted zeal. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 461-63 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971). The district judge, however, considered relevant to his exercise of discretion a factor that reflected the Whelans' choice, not that of ACT: the Whelans' jury trial demand.

Were this a bench trial, we might have greater reason to question the district court's refusal to accord preclusive effect to findings made in *Abell v. Elmer*. *Cf. Synanon Church v. United States*, 820 F.2d 421 (D.C. Cir. 1987). The presence or absence of a jury as factfinder, the Supreme Court has noted, in itself is a "basically neutral" factor. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 n.19 (1979); *see also* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4423, at 223 (1981); *id.* § 4465, at 600 (preclusion may not be defeated *simply* by manifest differences between judge and jury trial). It was not improper, however, in the circumstances here presented, for the district judge to note the altered character of the trier demanded by the parties urging preclusion.

A ruling for the Whelans on issue preclusion might have given them a head start larger than warranted in the jury's deliberations. The judge, in other words, indicated concern not simply about the difference in factfinders; rather, his practical judgment turned on the prospect of skewing or distorting the jury's judgment in the particular setting before him. We cannot say that it was unsound for the district judge, in view of the proof burden shift and his concern about unduly swaying or confusing the jury, to exercise his discretion in favor of allowing both sides to submit their full case to the jury's judgment. *See Parklane Hosiery Co.*, 439 U.S. at 331 (regarding offensive use of issue preclusion by nonparties, the preferable approach for federal courts is not to preclude recourse to the doctrine, "but to grant trial courts broad discretion to determine when it should be applied"). Accordingly, we leave undisturbed the district court's rul-

ing denying preclusive effect to findings made in *Abell v. Elmer*.

B.

The district court granted Abell and Toomey's motion for summary judgment dismissing the malicious prosecution claims on the ground that the Whelans had failed to establish an essential element of the claims: termination of the Putty Hill lawsuit and the Maryland administrative proceeding favorable to themselves. Since, under our reading of District of Columbia law, the question should have been submitted to the jury, we reverse.

It is generally thought that "to prevail in a claim of malicious prosecution, plaintiff must plead and prove [that] the underlying suit terminated in plaintiff's favor." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980). Following California law, the District of Columbia Court of Appeals has determined that favorable termination does not require a final disposition on the merits; rather, any termination that "reflects on the innocence of the defendant in the underlying suit" may suffice. *Brown v. Carr*, 503 A.2d 1241, 1245 (D.C. 1986) (citing *Minasian v. Sapse*, 80 Cal. App. 3d 823, 827, 145 Cal. Rptr. 829, 832 (1978)). A disposition on procedural grounds (such as dismissal for failure to file within the limitations period), for example, generally will not constitute favorable termination. *See id.* Still, as the district court below recognized, the voluntary dismissal of a legal action in some circumstances tends to indicate the original defendant's innocence and therefore may satisfy the favorable termination requirement. *See Minasian*, 80 Cal. App. 3d at 827, 145 Cal. Rptr. at 832.

Favorable termination is ordinarily "a question of law . . . to be determined by the trial court." *Weisman v. Middleton*, 390 A.2d 996, 1003 (D.C. 1978). We agree with the district court that as a matter of law the Maryland administrative proceeding did not terminate favorably to the Whelans. Andrew Whelan's undertaking with the Mary-

land Securities Commission was essentially a settlement that did not reflect favorably (or unfavorably) on his innocence, *see Minasian*, 80 Cal. App. 3d at 827 n.4, 145 Cal. Rptr. at 832 n.4, and the order vacating the undertaking plainly states that it was vacated according to its own terms—not, as appellants suggest, because of Judge Gesell's findings in *Abell v. Elmer*.

We disagree, however, with the district court's ruling regarding the termination of the Putty Hill litigation. Appellees contend that they sought to dismiss the lawsuit because the Whelans' insolvency would prevent recovery on any judgment obtained. The Whelans argue that the circumstances surrounding the dismissal, particularly Judge Gesell's disparagement of the case and his admonition to ACT to "fish or cut bait," demonstrate that the partners actually dismissed the lawsuit because it was frivolous—which, if true, would reflect on the Whelans' "innocence." When an allegedly malicious action is terminated voluntarily and the original plaintiff's motivation for seeking dismissal is disputed, the question whether the termination was favorable to the original defendant should be submitted to the jury. *See id.* at 828, 145 Cal. Rptr. at 832. Factual questions concerning ACT's reasons for dismissing the Putty Hill lawsuit remain, and because of that, we believe that the district court erred in deciding the matter on a summary judgment motion. Accordingly, we reverse the district court's order dismissing the malicious prosecution claims with respect to the Putty Hill litigation.

C.

The district court also granted Abell and Toomey's motion for summary judgment on the Whelans' abuse of process claims. To establish abuse of process, a plaintiff must show "a perversion of the judicial process and achievement of some end not anticipated in the regular prosecution of the charge." *Morowitz*, 423 A.2d at 198. The essence of the tort is the use of legal process for improper

purposes, and so abuse of process is conceptually different from, but overlaps with, malicious prosecution, the latter of which occurs only when a legal action is brought without probable cause. *See Neumann v. Vidal,* 710 F.2d 856, 860 (D.C. Cir. 1983) (construing D.C. law). The Whelans alleged both a perversion of the judicial process (legal proceedings designed to compel concessions in a business relationship) and the accomplishment of an improper result (harm to the Whelans' investment in the Corporation and to their other business opportunities). The district court granted Abell and Toomey's summary judgment motion on the ground that the Whelans had failed to establish two additional propositions: that ACT "unjustly procured a seizure or distraint of some kind" and that the partners actually achieved their "ulterior objective"—namely, obtaining financial concessions from the Whelans. We think that the court, by asking that much from the Whelans, misconstrued District of Columbia law.

We find no support for the requirement that the plaintiff in the allegedly abusive action must have fully achieved his ulterior goal. The District of Columbia Court of Appeals has held only that "*some end* not contemplated in the regular prosecution of the charge" must be accomplished. *Morowitz,* 423 A.2d at 198 (emphasis added). And we have previously determined that an injury markedly similar to the one claimed by the Whelans can support an abuse of process claim. In *Neumann v. Vidal,* the plaintiff alleged that the defendant had filed a lawsuit and instituted patent proceedings in order to prevent the plaintiff from conducting business. We reversed the district court's dismissal of the plaintiff's abuse of process claim, holding that the jury should decide whether the challenged proceedings "were essentially designed 'to accomplish some end which the process was not intended by law to accomplish'—such as frightening off [the plaintiff's] investors or delaying his getting underway." *Neumann,* 710 F.2d at 860 (quoting *Hall v. Field Enterprises, Inc.,* 94 A.2d 479, 481 (D.C. 1959)). It made no difference whether

the plaintiff asserting abuse of process actually succumbed to the pressure; indeed, it would be perverse for courts to deny relief to those who steadfastly defend themselves against abusive actions and are hurt in the process. We therefore think it quite sufficient that, allegedly at least, appellees succeeded in deliberately causing collateral damage (apart from the litigation itself) to the Whelans as part of their scheme. As we read the law of the District, an allegation that the original plaintiff seriously damaged the complaining party's business opportunities for an unfulfilled purpose, such as coercing financial concessions, is adequate to satisfy the "achievement" element of the tort.

We do not believe that our opinion in *Yellow Bus Lines, Inc. v. Drivers Local Union 639,* 883 F.2d 132 (D.C. Cir. 1989) (construing D.C. law), although ostensibly favorable to appellees, requires a different result. That case involved an allegation that a union business director had sued an employer for improper purposes, one of which was to coerce the employer to sign a collective bargaining agreement. We held that to prevail on an abuse of process claim, the employer had to demonstrate "not only ulterior motive, but success in achieving illegitimate ends with resulting injury." *Id.* at 137-38. We upheld a judgment against the employer in part because *no* significant injury was proven: the union dropped its demand for a collective bargaining agreement, and the parties settled the allegedly abusive action for $3,000. *See id.* at 138. Mere allegation that a party filed suit to obtain an "ordinary" settlement is insufficient for a claim of abuse of process. *Id.* (citing *Morowitz,* 423 A.2d at 198). By contrast, intentionally causing severe financial injury through the prosecution of legal proceedings, as the Whelans allege ACT did here, is, as *Neumann v. Vidal* indicates, quite a different matter.

Nor do we find a distraint or seizure requirement in District of Columbia law. The district court apparently extrapolated this notion from two cases—*Hall v. Hollywood Credit Clothing Co.*, 147 A.2d 866 (D.C. 1959), and

Hall v. Field Enterprises, Inc., 94 A.2d 479 (D.C. 1953)—in which the plaintiffs in the original action obtained attachments and the District of Columbia Court of Appeals (then the Municipal Court of Appeals for the District of Columbia) found that they had stated claims of abuse of process. That these are the only cases in which the Court of Appeals has permitted abuse of process actions does not establish attachment (or similar judicially sanctioned interference with property or person) as a necessary element of the tort. For similar reasons, we think that appellees' reliance on *Neumann v. Vidal* in this context is misplaced. It is true that the original plaintiffs in that case obtained an injunction, but we neither held nor suggested that this factor was necessary to our decision to allow an abuse of process claim. *See Neumann*, 710 F.2d at 860-61. We therefore reverse the district court's order granting summary judgment on appellants' abuse of process claims.

D.

The next question is the validity of the district court's ruling that the Whelans could not recover damages for the lost value of their investments in the Corporation, and of the directed verdict on the Whelans' breach of fiduciary duty claim—both of which were based upon appellees' argument that the Whelans were not the real parties in interest. We do not reach the merits of this argument, which would require us to explore substantive law regarding the circumstances under which a shareholder can recover for injuries to a corporation, because Abell and Toomey did not raise it until the first day of trial. We are of the view that the district court abused its discretion by granting the motion that late in the proceedings.

Appellees recharacterize their real-party-in-interest defense on appeal (using the terminology employed by the district court) and assert that the Whelans lacked Article III standing, a jurisdictional issue that can be raised at any time. To be sure, courts have on occasion denied

stockholders' suits alleging injury, asserting that the stockholders lacked "standing" to bring such an action because the stockholders, "experiencing no direct harm, possess[ ] no *primary* right to sue." *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) (emphasis added), *cert. denied*, 401 U.S. 974 (1971); *accord EMI Ltd. v. Bennett*, 738 F.2d 994, 996-97 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). But we do not read these cases as actually turning on the question whether the stockholder has suffered a sufficiently direct injury to establish Article III injury or causation. The courts do not conduct that kind of analysis. It may well be that if a minor injury is suffered by a large corporation it would be difficult to trace a "distinct and palpable injury" to a shareholder, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), but that would certainly not be so if the damage was to a closely held corporation. Conceptually, then, the problem is not an Article III one. *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (economic injury satisfies Article III).

Standing and real-party-in-interest questions do overlap to the extent that both ask whether the plaintiff has a personal interest in the controversy. *See* 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1524, at 329-30 (1990). But the question whether the suit should be brought by the Whelans or the Corporation really depends, as we have noted, on considerations and conventions of corporate law—whether the corporation should be entitled to bring an action, at least in the first instance, without the distraction of stockholders' suits—which we think are brought into play under Rule 17(a) of the Federal Rules of Civil Procedure.

Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a). In other words, the action must be brought by the person entitled under the governing substantive law to enforce the asserted right. *See District of Columbia ex rel. American Combustion, Inc. v. Transamerica Ins.*

Co., 797 F.2d 1041, 1048 (D.C. Cir. 1986). A real-party-in-interest defense can be raised as a Rule 12(b)(6) motion, stating, in effect, that because the plaintiff is not the person who should be bringing the suit, the plaintiff has "fail[ed] to state a claim upon which relief can be granted."[7] FED. R. CIV. P. 12(b)(6). And a Rule 12(b)(6) motion can be raised at trial. *See id.* 12(h)(2). Rule 17(a), however, provides that "[n]o action shall be dismissed on [real-party-in-interest grounds] until a reasonable time has been allowed after objection for ratification of commencement of the action by . . . the real party in interest." *Id.* 17(a). This implies that the defense may *not* be raised at any time, for the real party must have the opportunity to step into the "unreal" party's shoes and should not be prejudiced by undue delay. *See* 6A C. WRIGHT, A. MILLER & M. KANE, § 1554, at 407 ("Regardless of what vehicle is used for presenting the objection [12(b)(6) motion or 8(c) defense], it should be done with reasonable promptness."). For this reason, we hold that where a Rule 17(a) defense is made, judges abuse their discretion in allowing the plea as late as the start of the trial if the real party has been prejudiced by the defendant's laxness. *See, e.g., Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102-03 (5th Cir. 1989) (Rule 17(a) defense waived when made at the close of the plaintiff's evidence), *cert. denied*, 110 S. Ct. 1480 (1990); *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir. 1982) (defense waived when made sixteen days before trial).

In this case, Rule 17(a) "ratification" was impossible because Abell and Toomey did not raise the real-party-in-interest issue until the trial was underway. The prejudice here is particularly acute because the Corporation, the alleged real party in interest, was in the hands of a bankruptcy trustee. The considerable lapse of time (not to mention the numerous adverse rulings the district court had

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[7]We note that the question how a Rule 17(a) defense is raised (as a 12(b)(6) motion or as a Rule 8(c) affirmative defense) remains unsettled. *See* 6A C. WRIGHT, A. MILLER & M. KANE, § 1554, at 405-09.

made before the trial had even begun) may have hampered the Whelans' ability to induce the trustee to join the action. The trustee might have been more willing to risk litigation at the beginning of the bankruptcy proceedings, when unrelated claims were certain to prevent the winding down of the estate, than two years into the bankruptcy, when the trustee's task might have been nearing completion. The possibility of the Whelans buying the Corporation's claim from the trustee, moreover, may well have evaporated over the two years during which discovery in this case was conducted. We therefore reverse both the decision to preclude evidence about the lost value of the Whelans' stock and the directed verdict against the Whelans on the breach of fiduciary duty claim.[8]

E.

Appellants also challenge the judgment n.o.v. (now called judgment as a matter of law) as to the jury's verdict that ACT tortiously interfered with Andrew Whelan's prospective business opportunities unrelated to the Corporation. To establish this tort under District of Columbia law, the plaintiff must show that the defendant intentionally interfered with business opportunities that were "commercially reasonable to anticipate." *Carr v. Brown,* 395 A.2d 79, 84 (D.C. 1978). The district court determined that no reasonable jury could have found for Andrew Whelan because the opportunities that were allegedly frustrated did not exist or were insufficiently concrete when ACT sent the complaint letter to the Maryland Securities Commission and filed the Putty Hill lawsuit in, respectively, February and March of 1984. We agree with appellants, however, that the alleged tort consisted not solely of these two discrete acts, but also of ACT's *continued* prosecution of legal proceedings against the Whelans.

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[8]In light of this disposition, we need not reach the other issues raised by appellants regarding the district court's decision to deny various attempts to make the Corporation a plaintiff.

Assuming, *arguendo*, that Andrew Whelan had no concrete business opportunities at the time ACT initiated the legal actions against the Whelans, the jury's verdict could stand only if the allegedly tortious conduct "continued" until the opportunities became concrete. Under District of Columbia law, a plaintiff establishes a continuing tort by showing "(1) a continuous and repetitious wrong, (2) with damages flowing from the act as a whole rather than from each individual act, and (3) at least one injurious act within the limitation period." *DeKine v. District of Columbia*, 422 A.2d 981, 988 n.16 (D.C. 1980) (quotation marks and citation omitted). We need not decide whether the prosecution of an administrative proceeding (such as the Maryland Securities Commission investigation), which is conducted independently by the agency once a complaint is filed, can constitute a continuing tort on the part of the complainant, because we agree with appellants that the ongoing prosecution of a lawsuit (such as the Putty Hill litigation) can suffice.

It seems to us that a lawsuit is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition of the case. It is repetitive in that it represents the assertion, every day, of the plaintiff's claim. *Cf. Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933, at 72,770 (D.D.C. 1981) (holding that the statute of limitations on an abuse of process charge begins to run not when the defendant institutes the allegedly abusive claim, but when he ceases to assert it). A defendant subject to a lawsuit is likely to suffer damage not so much from the initial complaint but from the cumulative costs of defense and the reputational harm caused by an unresolved claim.

Appellees mistakenly rely on our statement in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), that "the mere failure to right a wrong and make the plaintiff whole cannot be a continuing wrong," *id.* at 230, to suggest that they cannot be held liable for failing immediately to dismiss their complaints against the Whelans. We believe that *Fitzgerald* is inapposite. In that case, a fed-

eral employee claimed, in order to avoid a statute of limitations, that the Civil Service Commission's failure to provide him with complete relief was part of a "continuing conspiracy." We rejected this argument because an exception for unredressed wrongs would obliterate the limitations rule. *See id.* at 229-30. A decision regarding an employment discharge is a single act that finalizes relations between the parties, while the commencement of a lawsuit is only the first link in a chain of conduct that does not end until the complaining party ceases prosecution of the suit. *Cf. Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984) ("[When] no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable." (quoting *Fowkes v. Pennsylvania R.R.*, 264 F.2d 397, 399 (3d Cir. 1959))).

Appellees cannot " 'be allowed to acquire a right to continue [their allegedly] tortious conduct,' " *id.* at 822 (quoting *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 908 (8th Cir. 1980)), simply on the ground that the Whelans' business expectancies were too contingent when ACT commenced the Putty Hill lawsuit. The evidence presented at trial amply supports the conclusion that both the medical clinic and pharmacy opportunities and Andrew Whelan's franchise opportunity in the unrelated restaurant business crystallized well before Abell and Toomey moved to dismiss the Whelans from the suit in October 1984.[9] The jury therefore could have reasonably found that ACT, through the maintenance of the Putty Hill lawsuit, intentionally interfered with Andrew Whelan's business opportunities, and we accordingly reverse the judgment n.o.v.

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[9]Edward Whelan testified that the Whelans' medical clinic, which apparently was later turned into the pharmaceutical interest, was incorporated in March 1984, and Andrew Whelan testified regarding a business plan for, and deposit made on, the separate restaurant franchise before July 1984.

F.

We affirm the district court's denial of appellants' motions asking that the court interview the jurors and seeking leave to obtain jurors' affidavits in order to ascertain their true verdict on Edward Whelan's claim of tortious interference with his business opportunities unrelated to the Corporation. The court denied the Whelans' motions because the jurors had three separate opportunities to repudiate the verdict against Edward Whelan —the foreman's recitation of the verdict, the jury's collective affirmation of it, and a poll of individual jurors—and at no point did any juror indicate that the verdict was incorrect. The court also observed that any reservations jurors subsequently expressed to the Whelans' counsel may have been influenced by counsel's leading questions or post-trial advocacy, and that allowing jurors' second thoughts to disturb their decision would threaten the finality of all jury verdicts.

Decisions regarding ascertainment of the jury's true verdict are within the trial court's discretion, *see Freid v. McGrath*, 135 F.2d 833, 834 (D.C. Cir. 1943), and the court did not abuse its discretion in this case. The possibility of leading questions and post-trial arguments masquerading as inquiries was substantial, and we recognize the potential for abuse in the procedures appellants suggested.

G.

Finally, appellants would have us reverse the district court's ruling vacating the default orders against Chase. Appellees defend the district court's orders on the ground that Chase's co-defendants Abell and Toomey were successful on all counts. They rely on the venerable case *Frow v. De La Vega*, 82 U.S. 552 (1872), in which the plaintiff alleged that eight defendants had jointly conspired to defraud him of title to a large tract of land. The lower court entered a default judgment against one defendant who failed to answer on time but found for the

remaining defendants on the merits. The result was two irreconcilable judgments: according to the default decree, the plaintiff held title; under the judgment on the merits, the seven other defendants did. The Supreme Court reversed, holding that "where a bill makes a joint charge against several defendants . . . a final decree on the merits against the defaulting defendant alone" cannot stand. *Id.* at 554.

In *Carter v. District of Columbia*, 795 F.2d 116 (D.C. Cir. 1986), however, we construed *Frow* narrowly to hold that in cases involving multiple defendants, a default order that is inconsistent with a judgment on the merits must be set aside only when liability is truly joint—that is, when the theory of recovery requires that all defendants be found liable if any one of them is liable—and when the relief sought can only be effective if judgment is granted against all. *See id.* at 137. Chase's liability in this case is not so intertwined with Abell's and Toomey's that consistent findings against each of them are necessary. Nor does judgment in favor of Abell and Toomey make monetary recovery from Chase practically impossible.

Although we therefore reject appellees' reasoning in this regard and vacate the district court's ruling setting aside the default orders against Chase, the district court on remand is free to consider whether to vacate the default orders in accordance with FED. R. CIV. P. 55(c), which provides that the court may set aside an entry of default "[f]or good cause."

* * * *

In sum, we affirm the district court's denial of appellants' motion to accord issue preclusion to Judge Gesell's findings in *Abell v. Elmer*. We also affirm the district court's orders denying appellants' motions to ascertain the true meaning of the jury's verdict against Edward Whelan on his claim of tortious interference with his business opportunities unrelated to the Corporation.

We reverse the district court on all of the other issues raised in this appeal. The order precluding the Whelans from introducing evidence about damage to the Corporation is reversed, as is the decision to direct a verdict against the Whelans on the breach of fiduciary duty claim. We also reverse the summary judgments against the Whelans on their malicious prosecution and abuse of process claims and remand for further proceedings on these issues. The judgment n.o.v. against Andrew Whelan on his claim of tortious interference with opportunities unrelated to the Corporation is reversed as well and the jury verdict in his favor reinstated. And, finally, we vacate the district court's orders setting aside the defaults entered against Chase. On remand, the judge may consider whether good cause warrants setting aside these orders.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7016
CV 87-01763

Andrew J. Whelan, et al.,

Appellants

v.

Tyler Abell, individually and as a member of the Law Firm Bregmen, Abell and Kay, et al.

and consolidated cases

September Term, 1991

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 30 1992

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Appellees' Suggestions For Rehearing *En Banc* have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7016

Andrew J. Whelan, et al.,

Appellants

v.

Tyler Abell, individually, and as a member of the law firm of Bregman, Abell & Kay, et al.

And Consolidated Case Nos. 90-7017 & 90-7018

September Term, 1991

United States Court of Appeals
For the District of Columbia Circuit

FILED MAR 30 1992

CONSTANCE L. DUPRÉ
CLERK

Before: RUTH B. GINSBURG and SILBERMAN, Circuit Judges

ORDER

On consideration of appellees' petitions for rehearing and the response thereto, it is

ORDERED, by the court, that the petition for rehearing is granted in part, and the opinion filed on January 17, 1992 is amended as follows:

Page 3, line 12, delete the word "two" and insert in lieu thereof the word "three".

Page 14, section D, lines 5-7, delete "—both of which were based upon appellees' argument that the Whelans were not the real parties in interest".

Page 14, section D, line 7, before the sentence beginning with "We do not reach", insert the following:

> The Whelans alleged that Abell and Chase, who served as counsel to the Corporation (Chase also served as director), breached a fiduciary duty owed to the Whelans. We uphold the directed verdict because under D.C. law, an attorney's fiduciary duty is owed to the company, not the shareholders. *See Egan v. McNamara*, 467 A.2d 733, 738-40 (D.C. 1983).
>
> Appellees claimed that the Whelans could not sue for the lost value of their investments in the Corporation because the Whelans were not the real parties in interest.

Page 17, line 11, delete the word "both".

Page 17, lines 13-14, delete "and the directed verdict against the Whelans on the breach of fiduciary duty claim".

Page 18, line 3, delete "the jury's verdict" and insert in lieu thereof "a decision in Andrew Whelan's favor".

Page 19, first full paragraph, delete the last sentence beginning with "The jury" and ending with "judgment n.o.v." and insert in lieu thereof:

> Because the judgment n.o.v. is based on an incorrect theory of the law of tortious interference with prospective business advantage, we reverse.

Page 21, fifth line from the bottom of page, after *"Abell v. Elmer"* insert ", and we sustain the directed verdict on the breach of fiduciary duty claim".

Page 22, lines 4-8, delete "is the decision to direct a verdict against the Whelans on the breach of fiduciary

duty claim. We also reverse the summary judgments against the Whelans on their malicious prosecution and abuse of process claims and" and insert in lieu thereof:

> are the summary judgments against the Whelans on their malicious prosecution and abuse of process claims. We

Page 22, lines 11-12, delete "and the jury verdict in his favor reinstated".

Page 22, line 12, insert before the sentence beginning with "And, finally," the following:

> The district court did not rule on 18 other grounds for judgment n.o.v., or new trial, raised by ACT, and on remand is free to address them.

It is FURTHER ORDERED, by the court, that appellees' petitions for rehearing are otherwise denied. The rule that a real-party-in-interest claim is waived if not presented until trial is properly applied to this case. The petitions for rehearing point to pretrial documents in which the claim was purportedly raised, but appellees did not call these documents to the court's attention when the case was argued. The panel's holding regarding abuse of process is not inconsistent with the District of Columbia Court of Appeals' recent discussion of the tort in *Bown v. Hamilton*, No. 90-769, 1992 D.C. App. LEXIS 14 (D.C. Jan. 17, 1992).

Per Curiam
For the Court:
Constance L. Dupre,
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-7016

Andrew J. Whelan, et al.,

Appellant

v.

Tyler Abell, individually, and as a member of the law firm of Bregman, Abell & Kay, et al.

And Consolidated Case Nos. 90-7017 & 90-7018

September Term, 1991

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 10 1992

CONSTANCE L. DUPRÉ
CLERK

Before: RUTH B. GINSBURG and SILBERMAN, Circuit Judges

ORDER

The Clerk is directed to file the motion of appellee John B. Toomey for reconsideration of a portion of the Court's Order filed on March 30, 1992. Upon consideration thereof, it is

ORDERED, by the Court, that the motion is denied. It is correct that the pretrial real-party-in-interest/standing filings were called to the court's attention at oral argu-

ment. They were not mentioned in appellees' brief, however, as required by Fed. R. App. P. 28(a)(4), (b). The point was therefore waived.

Per Curiam
FOR THE COURT:
Constance L. Dupre, Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 87-442, 87-1763

ANDREW WHELAN, *et al.*,

Plaintiffs,

v.

TYLER ABELL, *et al.*,

Defendants.

FILED

JAN 3 1990

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

This commercial dispute is presently before the Court on defendants' motion for judgment n.o.v., or a new trial, following a jury verdict finding three individual defendants liable to one of the two individual plaintiffs. Plaintiffs alleged, and the jury found, by special verdict, that an unfounded complaint by defendants to a state securities commissioner and a baseless lawsuit filed against the Whelans in federal district court tortiously interfered with certain prospective business opportunities of plaintiff Andrew Whelan alone. Of the nineteen grounds advanced by defendants in support of their motion, the Court finds one of them to be meritorious and dispositive, and will grant judgment n.o.v. for defendants as prayed without passing upon the remainder.

I.

In 1984 plaintiffs Andrew and Edward Whelan, founders of an enterprise known as Animated Playhouses Corporation ("APC") whose business it was to market theme restaurants around the country, embarked on a venture with defendants Anthony Chase, Tyler Abell, and John Toomey, whereby defendants purchased an APC-affiliated restaurant in Baltimore County, Maryland, from APC, and APC assumed control over the restaurant's operations. With the restaurant failing financially, and the parties disagreeing as to who would bear the loss, defendants wrote the Maryland Securities Commissioner on February 23, 1984, to complain of alleged violations of the Maryland franchise laws by Andrew Whelan (the "Maryland letter"). They also filed a lawsuit against both Whelans, and others, in U.S. District Court for the District of Columbia on March 22, 1984, alleging various commercial improprieties, including charges of fraud and RICO Act violations (the "Putty Hill" lawsuit). The Maryland letter resulted in a "show cause" order issued by the securities commissioner to Andrew Whelan, and resulted, ultimately, in his formal "undertaking" with the securities commissioner to abide by state securities laws in the future. The Putty Hill lawsuit ended, as to the Whelans, when defendants voluntarily dismissed them from the action.

Then, contending that the Maryland letter and Putty Hill lawsuit had, in effect, "destroyed" APC by making it impossible for the Whelans to raise new money for the enterprise, they brought the instant identical (and now consolidated) actions, one in this Court and a second in the U.S. District Court for the District of Maryland, and transferred here. The Whelans charged Abell, Toomey and Chase with malicious prosecution, abuse of process, breach of fiduciary duty (to APC, not to the Whelans), and tortious interference with prospective business advantage. In ruling upon various pretrial motions, the Court dismissed

all counts but those asserting claims of breach of fiduciary duty and tortious interference with prospective business advantage, and the case went to trial on May 8, 1989, on those counts.[1]

Plaintiffs initially depended almost exclusively upon the alleged injury to the financial prospects of APC to establish their damages. In mid-trial the Court ruled that the Whelans themselves, whether as officers or stockholders, lacked standing to maintain APC's claims vicariously even though their own investments in the corporation decreased in value, and could recover, if at all, only for lost business opportunities personal to them, as distinct from APC's corporate claims.[2] All that then remained in the case was the Whelans' claim that the Maryland letter and the Putty Hill lawsuit constituted tortious interference with plaintiffs' *personal* business opportunities (i.e., other than their investments in APC), which, the evidence showed, were the following ventures: "Medic + Doctors," a proposed chain of walk-in health care facilities; "Physicians Pharmaceutical Services" ("PPS"), a prescription drug business to be related to Medic + Doctors; and "T.J. Applebee's," an "adult fast food" franchise restaurant concept.

Defendants now argue that these business ventures arose subsequent to the submission of the Maryland Letter and the filing of the Putty Hill lawsuit and, thus, as a matter

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[1] *See, generally,* the Memoranda and Orders of March 8 and April 19, 1989.

[2] The Court based its decision on case law holding that a cause of action for damages for injury to a corporation belongs solely to the corporation and cannot, in the circumstances, be enforced by the shareholders. *See Cowin* v. *Bresler,* 741 F.2d 410 (D.C. Cir. 1984); *Nagle* v. *Commercial Credit Business Loans, Inc.,* 102 F.R.D. 27 (E.D. Pa. 1983). (The Whelans did not bring this action as a derivative suit.)

The APC claims became the subjects of a separate, subsequent lawsuit, Civ. Action 89-1625, filed after the Court's ruling, which the Court in a separate Memorandum and Order also dismisses today on limitations grounds.

of law, could not have been the targets of the acts of intentional interference alleged here. The evidence presented at trial with respect to those claims must, of course, be viewed "in the light most favorable to the plaintiff and giving him the advantage of every fair and reasonable inference that [it] may permit." *Richardson By Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 827 (D.C. Cir. 1988).

II.

In the District of Columbia the elements of an action for intentional interference with prospective business advantage are: 1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; 2) knowledge by the defendant of the existence of the relationship; 3) intentional acts on the part of the defendant designed to disrupt the relationship; and 4) damages proximately caused by the defendant's acts. *Altimont* v. *Chatelain*, 374 A.2d 284 (D.C. 1977); *Carr* v. *Brown*, 395 A.2d 79 (D.C. 1978); *Brown* v. *Carr*, 503 A.2d 1241 (D.C. 1986). Thus, a plaintiff alleging intentional interference must demonstrate that the defendant knowingly and intentionally interfered with a *particular* business opportunity. The existence of this requirement of *scienter* derives naturally from the second and third elements above, and is confirmed as well by the holding in *Brown* v. *Carr, supra*, in which the D.C. Court of Appeals, in affirming the trial court's dismissal of a claim of intentional interference with a land acquisition transaction, stated that appellant's claim failed because "no evidence was presented that [appellees] had knowledge of the ongoing negotiations" between appellants and other land owners for sale of the same land. 503 A.2d at 1247. Thus, even if a defendant's conduct has, in fact, interfered with a plaintiff's business opportunities, no liability attaches without proof of defendant's knowledge of those

to them. As the D.C. Court of Appeals stated, "one cannot unintentionally induce the breach of a contract." *Id.*[3]

The requirement of specific intent is further shown in comment i to § 766 of the *Restatement (Second) of Torts*, describing the nature of the tort of intentional interference with contract:

> To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. Although the actor's conduct is in fact the cause of another's failure to perform a contract, the actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract.

The *Restatement* makes clear that to impose liability, intent to interfere must coincide temporally with both the act of interference and knowledge of the existence of the opportunity being impeded. As applied to the instant case, if, as defendants argue, the business opportunities that they are charged with disrupting were not extant at the time defendants commenced their course of harassment by litigation, defendants could have had neither knowledge of those opportunities nor specific intent to interfere with them.

The Maryland letter was sent on February 23, 1984, and the Putty Hill lawsuit filed the following March 22nd. By the Whelans' own testimony, at that time PPS had not even been conceived; it evolved from negotiations that did not commence until April or May of 1984. Likewise, Andrew Whelan did not acquire the franchise rights to

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[3] The D.C. Court of Appeals treated intentional interference with prospective business advantage as "run[ning] parallel to . . . interference with existing contracts." 503 A.2d at 1247, quoting W. Prosser, *Law of Torts* § 130, at 952 (4th ed. 1971).

T.J. Applebee's until April, 1984, and the restaurant did not emerge from its formative stages for several months thereafter.[4] These business opportunities simply did not exist as such when defendants committed their allegedly tortious acts; thus, defendants could not have intended specifically to interfere with them. Therefore, as to PPS and T.J. Applebee's, the Whelans' claim of intentional interference will not lie.

Plaintiffs' case is marginally stronger with respect to Medic + Doctors, but still not sufficient to support the verdict, for there is no evidence that the business was a tangibly concrete opportunity to warrant legal protection at the time of the letter and the lawsuit. Under *Carr* v. *Brown*, *supra*, it must be "commercially reasonable to anticipate" that a venture will succeed before it earns protection from intentional interference, 395 A.2d at 84, yet Medic + Doctors was still nascent in late March, 1984. Even by April of that year there was no business plan and no financing, and certainly no "commercially reasonable" basis upon which to predict its success. The business was not even incorporated until three days after defendants filed the Putty Hill lawsuit.[5]

In short, the Court finds that plaintiffs' expectations were not developed to the point of commercial reasonableness when defendants mailed their letter of complaint to the Maryland Securities Commissioner and filed the Putty Hill lawsuit. With respect to Medic + Doctors, as well as the other two enterprises, plaintiffs simply have not proven defendants' specific intent to interfere with what was known to them as a business opportunity with measurably promising prospects.

Plaintiffs argue that the Putty Hill lawsuit and Maryland letter constituted "continuing torts" in which the intent

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[4] *See, generally,* Tr. C-33-34, 61-64; I-154; J-110-113; J-176.

[5] *See, generally,* Tr. I-141-146, 150-154; J-117-120, 134-136.

factor survives the cessation of actual acts of interference and thus coincides with the subsequently arising business opportunities. In support of their argument, however, plaintiffs cite only cases respecting the time of accrual of a cause of action for limitations purposes, and most involve repetitive injury or a series of independently tortious acts. Plaintiffs cite no cases, and the Court has found none, where a wrongful lawsuit was held to be a continuing tort.

The Court finds plaintiffs' cases to be inapposite and their argument misconceived. Defendants did not engage in a series of illegal acts. Only two wrongs were alleged: the sending of the letter and the filing of the lawsuit. Unlike the repetitive injury cases, defendants here acted but twice, although their deeds may have had enduring repercussions, much as single accident can result in permanent disabilities. To find either the letter or the lawsuit to be a "continuing tort" would ignore the teaching of *Fitzgerald* v. *Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977), to the effect that, "the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong . . ."

It may be, as the jury apparently found, that business opportunities that later presented themselves to the Whelans were adversely affected by the unfounded litigation and baseless complaint to a public official, but it does not follow that the adverse effect was the result of defendants' culpable intention to interfere with what were known to them to be reasonable expectations of economic advantage for the Whelans other than APC. Unfortunately for plaintiffs, however, such injury as may have been done to the prospects of APC, and the value of the Whelans' investments therein, were not at issue in this case.

No reasonable jury could have found upon the evidence here that defendants knowingly and intentionally interfered with the Whelans' specific business opportunities that remained in issue once they were deprived of the ability to recover for economic damage to the prospects of APC.

For the foregoing reasons, therefore, it is, this 3rd day of January, 1990,

ORDERED, that defendants' motion for judgment n.o.v. is granted; and it is

FURTHER ORDERED, that judgment notwithstanding the verdict, pursuant to Fed. R. Civ. P. 50 (b) is entered for defendants.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 90-7016

Consolidated Case Nos.
90-7017
90-7018

ANDREW J. WHELAN, *et al.*,

Appellants,

v.

TYLER ABELL, *et al.*,

Appellees.

APPELLEE JOHN B. TOOMEY'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Appellee John B. Toomey respectfully petitions the Court for a rehearing of its January 17, 1992 decision by a two-member panel in Case Nos. 90-7016 and 90-7018 and suggests that these cases be reheard *en banc.*[1]

Concise Statement of Issues and Their Importance

1. Whether the panel erroneously applied Rule 17, F.R. Civ.P., to allow appellants to pursue a claim for damages that this Court, in *Williams v. Mordkofsky,* 901 F.2d 158, 164 (D.C. Cir. 1990) and *Cowin v. Bresler,* 741 F.2d 410,

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[1] Toomey is not seeking rehearing in Case No. 90-7017. A Stipulation entered into by the Whelans, Toomey and Abell dismissing that appeal as to Toomey and Abell was filed with the Court on June 6, 1990.

414-416 (D.C. Cir. 1984), held is not cognizable under District of Columbia law. The panel's holding conflicts with the rule in *every* federal court of appeals that has addressed the issue.

2. Whether the panel's holding that a cause of action for abuse of process can rest solely on allegations that a lawsuit was maintained with an ulterior motive and has caused collateral injury is contrary to District of Columbia law. *See e.g., Bown v. Hamilton*, No. 90-769, January 17, 1992 (1992 D.C. App. Lexis 14). The holding materially expands the scope of the abuse of process tort and eliminates any need for the tort of malicious prosecution. Under the panel's holding malicious prosecution claims can be made as abuse of process claims, without the need to prove lack of probable cause or favorable termination. Unless reversed, the panel's holding will undermine the balance that the District of Columbia courts have carefully struck in defining the tort of abuse of process so as to preserve access to the courts.

3. Whether the panel erred by reinstating a jury verdict on the assumption that the jury could have found liability on a legal theory that was not embodied in the jury instructions.

Statement of the Case

As the panel indicated, this case arose out of litigation brought in March 1984 by appellees John B. Toomey (Toomey), Tyler Abell (Abell) and their former partner, the late Anthony Chase (Chase), concerning an April 1982 transaction in which Animated Playhouse Corporation (APC) sold and agreed to manage a restaurant in Putty Hill, Maryland. In that suit, Abell, Chase and Toomey sought damages for fraud and misrepresentation in connection with the sale of the restaurant and mismanagement in its operation.

Relying on statements by Judge Gesell in a separate action to which the Whelans were not parties, the panel decision gives an erroneous impression of the Putty Hill suit. In order to correct that impression, we set forth a more comprehensive statement of the background of this case than may be customary in a petition for rehearing.

APC was formed in mid-1981 by the Whelans and others to develop and operate a projected chain of new "family entertainment" restaurants to be known as "Captain Andy Rivertowne Restaurants." Andrew Whelan, APC's chairman and CEO until the end of 1983, testified that Abell and Chase, like other prospective investors, were told in early 1982 that APC planned to open more than 200 Rivertowne restaurants by 1987, and that it had signed "an agreement with an experienced restaurateur, who intends to establish 131 units in five mid-Western states." Tr. E-1, p. 87-90. As it turned out, APC had no agreements that bound any "experienced restaurateur" to open any restaurants. Tr. E-1, pp. 90-91. After two years in operation, APC had opened only seven restaurants. *Id.*

APC began in July 1981. It lost money every year thereafter. Tr. E-1, p. 73. By May 1983, its financial condition had deteriorated to the point that APC had stopped remitting to the government payroll taxes it had deducted from the paychecks of its employees and used the withheld funds "to keep the company operating." Testimony of A. Whelan, Tr. E-1, pp. 110-116. By the end of that year, APC had a total loss since its inception of over $6 million. Tr. E-1, p. 74. In addition, it owed more than $1 million in payroll taxes. (Tr. H-149-50). APC declared bankruptcy in July 1984.

In March 1984, Abell, Chase and Toomey commenced their Putty Hill lawsuit charging APC and the Whelans with fraudulently inducing their investment in the Putty Hill restaurant by spurious revenue projections and false representations of APC's ability to execute a 200-restau-

rant plan.[2] Seven months later, Abell and Toomey moved to dismiss the Putty Hill lawsuit after APC went bankrupt and the Whelans had represented that their assets were insufficient to satisfy a judgment. Slip. op. p. 11; Tr. J, p. 113.

In February 1987, the Whelans commenced the instant litigation in which they alleged that APC's failure was attributable to the Putty Hill lawsuit and a complaint letter that Abell sent to the Maryland Attorney General's Office in February 1984. Abell's letter had alleged, *inter alia*, that APC and Andrew Whelan had made false representations in violation of the Maryland Franchise Disclosure Act, Md. Code, Art. 56 § 345-365D, in connection with the Putty Hill transaction. The Whelans sought damages "in excess of $35,000,000"—90 times their investment in APC. The court below entered summary judgment dismissing the Whelans' claims for malicious prosecution, abuse of process and wrongful litigation, but allowed their claims for tortious interference with prospective business advantage and abuse of fiduciary duty to go to trial. (Toomey was not charged with breach of fiduciary duty.)

On the third day of the trial, the district court ruled on a contention Toomey had made two years and again ten months earlier and held, that the Whelans could not recover damages for losses in the value of their APC stock due to alleged injuries to APC's business. The trial continued on the Whelans' claim that defendants had tortiously interfered with the Whelans' pursuit of business

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[2] Other similar suits were filed against the Whelans. On October 6, 1984, Family Entertainment Centers filed suit for damages of $3 million based upon allegations of statutory misrepresentation and deceptive acts with respect to a Rivertowne restaurant it opened in Florida. Exhibit 453. Andrew and Edward Whelan were sued for $20 million by APC's California bank, which charged that the Whelans and others had fraudulently misrepresented APC's financial position to obtain a line of credit from the bank extended in February 1984. (Def. Ex. 239).

prospects in enterprises unrelated to APC. After a two-week trial, the jury found defendants liable to Andrew Whelan, but not to Edward Whelan. Defendants moved for judgment n.o.v. and, in the alternative, for a new trial. The district court granted the motion for judgment n.o.v. on one of the grounds urged "without passing on the remainder." Memorandum and Order filed June 3, 1990, p. 1. The court did not rule on the motion for a new trial.

Both Whelans appealed. A panel of this Court reversed the summary judgments on the malicious prosecution and abuse of process claims. The panel also reversed the district court's ruling that the Whelans could not recover damages for lost value of their APC stock, holding that the Whelans' right to maintain those claims turned on whether they were the "real-parties-in-interest" and that, under Rule 17, F.R.Civ.P., defendants had waived that contention by not raising it "until the trial was under way." Slip op. 16.

The panel also reversed the judgment n.o.v. dismissing Andrew Whelan's tortious interference claim, although it did not reverse the judgment dismissing Edward Whelan's parallel claim. It found that the maintenance of the Putty Hill lawsuit was a continuing tort and, while the jury instructions did not encompass such a theory, the panel nonetheless reinstated the verdict for Andrew Whelan, finding that the jury "could have found" liability on that theory. Slip op. at 19.

Argument

1. The panel erred in applying Rule 17, F.R.Civ.P., to avoid the well-established common law rule that shareholders do not have a cause of action for any loss in the value of their stock due to corporate injury and overlooked a portion of the record in finding that Toomey had not invoked that rule "until the trial was underway."

Toomey has maintained from the earliest stages of this case that the Whelans had no cognizable claim for any loss in the value of their stock resulting from defendants' alleged tortious acts. Following the lead of a number of courts, Toomey cast that argument in terms of whether the Whelans had standing to assert the claim, but the basis of Toomey's position, as recognized by the district court, was that the Whelans had no cause of action. Memorandum and Order filed Jan. 3, 1990, at 3, n.2.

The panel viewed Toomey's standing argument in Article III terms, but concluded that the point was really a real-party-in-interest question.[3] In the erroneous belief that Toomey had not objected to the Whelans' claims "until the trial was underway," the panel held that, under Rule 17, Toomey had waived the argument. Slip op. at pp. 15-17.

The panel's holding—the only decision we have found applying Rule 17 in these circumstances—misapprehended the district court's ruling and would permit the Whelans to pursue a cause of action that this Court—and every other federal appellate court which has addressed the issue—consistently have rejected. Although the Whelans maintain that the loss in the value of their APC stock is

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[3] Toomey had argued in a motion before the district court that the Whelans were not the real parties-in-interest. In his oral argument on that motion, however, Toomey's counsel characterized the matter as a Rule 12(b)(6) issue. Tr. C-1, pp. 24-30.

distinct from any harm to APC, the courts have held that a shareholder has no cause of action for loss in stock value resulting from injury to a corporation. *See, e.g., Williams v. Mordkofsky*, 901 F.2d 158, 164 (D.C. Cir. 1990); *Cowin v. Bresler*, 741 F.2d 410, 414-416 (D.C. Cir. 1984).[4] Rather, except in limited circumstances "(1) where defendant owes a debt to the individual plaintiffs other than as shareholders, or (2) the wrongs alleged were sustained by plaintiff-shareholders rather than the corporation," *William, supra* at 164, claims for the loss in value of stock are universally held to be an injury that is redressable only in a suit by the corporation, either directly or through a derivative action.

The courts have reasoned that "any decline in the market price of the shares . . . 'reflects the decrease in value of the firm.' " *Roeder, supra* at 30, and that the "shareholder will be made whole if the corporation obtains compensation." *Cowin, supra* at 415. Thus, in *Williams, supra*, this Court held that shareholders of a closely-held corporation could not maintain an action for malpractice which allegedly caused the corporation to lose a television license:

> The special injury alleged by the Williamses is loss of business opportunity due to the failed television application . . . . The Williamses chose to apply for the license through the corporation form . . . . The business opportunity belonged to [the

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[4] Accord *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30 (1st Cir. 1987); *Papilsky v. Berndt*, 466 F.2d 251, 255 (2d Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970); *Semida v. Rice*, 863 F.2d 1156, 1161-62 (4th Cir. 1988); *Adams-Lundy v. Association Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Gaff v. F.D.I.C.*, 814 F.2d 311, 315 (6th Cir. 1987); *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990); *Rylewicz v. Beaton Services, Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989); *EMI Ltd. v. Bennett*, 738 F.2d 994, 996-998 (9th Cir. 1984); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

> corporation] and the Williamses losses were derivative.

Williams, supra at 164. The Whelans' claim is for precisely the same kind of harm since, as stated in their appeal brief, they "were seeking to recover for the destruction of their investment in AP." Brief of Appellants at 24.

Consequently, Rule 17 is irrelevant to Toomey's claim. The issue before the court is not whether the shareholder or the corporation is the real-party-in-interest, but whether shareholders have a cognizable claim for losses in the value of stock—an issue that, as the panel acknowledged, many courts have couched in terms of whether the shareholders have standing to bring any such claim. Slip. op. p. 15. The district court correctly held that the law recognizes no such claim.

In addition, the panel's conclusion that Toomey did not raise the issue until trial is contrary to the record. Slip. op. p. 16. Toomey contended in his motion to dismiss, filed almost two years before trial, that the Whelans' claim for malicious prosecution should be dismissed because "the financial damage alleged in the complaint is damage to 'APC, its subsidiary and its affiliate' for which plaintiffs—who are stockholders, officers and directors of these corporations (Cplt. ¶¶ 10-11)—have no standing to recover."[5] That objection was preserved in Toomey's answer, which averred that the complaint failed to state a claim for which relief can be granted. And more than ten months before the trial, Toomey stated in his Pretrial Statement that:

> Plaintiffs, as stockholders in Animated Playhouses, have no standing to sue for any loss in value of their stock because of an injury alleged to have been suffered by Animated Playhouses.

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[5] Defendant John B. Toomey's Memorandum of Points and Authorities in Support of Motion to Dismiss, p.11, Supplemental Appendix (II) at 891.

Pretrial Statement, ¶ 6, R.E. 107, filed on July 11, 1988.

Toomey's contentions, raised almost two years before trial and again ten months before trial, satisfied any requirements of Rule 17, even assuming that rule was applicable. The panel erred both in finding Rule 17 relevant to this case and in holding that Toomey's pre-trial objections did not satisfy the requirements of the Rule.

2. The panel's holding that the Whelans can maintain a claim for abuse of process is contrary to the law of the District of Columbia.

The district court dismissed the Whelans' abuse of process claim on the grounds that the mere filing of a lawsuit cannot be an abuse of process without a seizure or distraint to accomplish a collateral purpose for which the judicial process was not intended. The panel reversed, finding no "distraint or seizure requirement in District of Columbia law." Slip Op. at 13.

The panel's decision disregards the District's clearly articulated policy to limit the scope of torts such as abuse of process that may inhibit access to the courts. In *Bown v. Hamilton*, No. 90-769, January 17, 1992 (1992 D.C. App. Lexis 14), released the same day as the panel's decision here, the District of Columbia Court of Appeals reiterated its "cautious approach in defining the scope of those torts based on the institution of litigation," explaining:

> It is the announced policy of this jurisdiction to allow unfettered access to our courts. In an effort to avoid infringing upon the right of the public to utilize our courts, *we are cautious not to adopt rules which will have a chilling and inhibitory effect on would-be litigants of justiciable issues.* We are likewise cognizant of our obligations to protect the innocent against *frivolous litigation* and to make victims of *groundless lawsuits* whole

> where they suffer special injury as the result of the suit.

Id. at 14, *quoting Morovitz v. Marvel*, 423 A.2d 196, 197-98 (D.C. 1980) (emphasis added). In accordance with that policy, the court denied an abuse of process claim for an eviction which plaintiff contended was designed to deny her a business opportunity. The court reiterated its previous holdings that "the institution of litigation in itself is insufficient" to support an abuse of process claim, *id.* at 16, and, since plaintiff only alleged that the suit for possession was meant to deny her a business opportunity, no cause had been stated. *Id.*

That holding follows prior decisions of the courts of the District which have consistently held that the "mere issuance of the process is not actionable, no matter what ulterior motive may have prompted it; the gist of the action lies in the use after issuance." *Morovitz v. Marvel*, *supra* at 198; *Bown v. Hamilton*, *supra* at 16. Abuse of process requires "the improper use of process after it is issued. Proper use of the machinery of the law, though with improper motive, is not tortious. . . ." *Goodall v. Frank R. Jelleff, Inc.*, 130 A.2d 781, 782 (D.C. 1957), *Id.* at 782."[6]

This requirement that there be a *misuse* of the judicial process is an essential protection against the unique risk that abuse of process actions may chill legitimate access to the courts. Unlike malicious prosecution, which applies only where the underlying suit was brought without probable cause and was terminated favorably to plaintiff, abuse of process may lie even where the underlying suit is meritorious. It is therefore no accident that the courts of the District have upheld abuse of process claims *only* where

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[6] *See also Keys v. Chrysler Credit Corp.*, 494 A.2d 200, 207 (Md. 1985) ("the action is not for maliciously abusing the process of the court").

a misuse of the *judicial process* is alleged through, for example, the seizure of property or arrest of persons.[7]

Indeed, were the panel decision to stand, there would be no need for the tort of malicious prosecution, since the same facts would support a claim for abuse of process without the requirement of proof of probable cause or favorable termination. That is manifestly not the law of

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[7] *See e.g., Williams v. City Stores Co.*, 192 A.2d at 534, 537 (D.C. Col. App. 1963); *Hall v. Field Enterprises*, 94 A.2d 479 at 481 (Mun Ct. App. Dist. Col. 1953).

This court has also held that to state a claim for abuse of process, plaintiffs must prove the "achievement of some end not contemplated in the regular prosecution of the charges." *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 138 (D.C. Cir. 1989), on rehearing *en banc*, 913 F.2d 948 (D.C. Cir. 1990), citing *Morovitz v. Marvel*, *supra* at 198. The panel held that this element was satisfied by allegations of injury to the Whelans' business opportunities. The holding is inconsistent with the holding in *Yellow Bus*, *supra*. That alleged injury, if it can be attributed to defendants' conduct, occurred simply as a result of the bringing of the Putty Hill lawsuit, not from any use of the court's processes. As the District of Columbia Court of Appeals indicated in *Bown*, n. 14, injury of that nature is addressed by malicious prosecution, not abuse of process.

the District of Columbia. *Bown v. Hamilton, supra.*[8]

3. The panel erred in reinstating the jury verdict pursuant to a theory of liability on which the jury was not instructed.

The district court instructed the jury that in order to return a verdict on the Whelans' claims for tortious interference, it had to find (1) that each defendant—

> undertook to *send the letter of complaint* [to the Maryland Securities Commissioner] and *filed the Putty Hill lawsuit* with the intention and for the specific purpose of interfering with plaintiff's prospective business relationships . . .

and (2) that those prospective business relationships failed as a result of those specific actions. Tr. L-118-119 (emphasis added). The jury returned a verdict in favor of Andrew Whelan and against Edward Whelan. Toomey filed a motion for judgment n.o.v. on a number of grounds and an alternative motion for a new trial. The district court granted Toomey's motion on the single ground that "[n]o reasonable jury could have found upon the evidence here that defendants knowingly and intentionally interfered with Whelan's specific business opportunities. . .," Memorandum and Order filed January 3, 1990 at 9, reserving judgment

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[8] This Court's decision in *Newmann v. Vidal*, 710 F.2d 856 (D.C. Cir. 1983), can be reconciled with the decision of the courts of the District if the injunction procured by the defendant in that case is viewed as equivalent to an attachment or arrest. However, if the issuance of that injunction was *not* necessary to the decision in *Neumann*, as the panel concluded, then Toomey respectfully submits that that case is inconsistent with District of Columbia law, as clarified in *Bown v. Hamilton*, and cannot be followed. If, however, this Court believes that, despite the decision in *Bown*, it is unclear whether the filing and prosecution of a lawsuit can give rise to a cause for abuse of process in the District of Columbia, Toomey requests that the Court certify the question to the District of Columbia Court of Appeals.

on the other grounds advanced by Toomey and not ruling on his motion for a new trial.

The panel reversed the judgment n.o.v. In doing so, however, it did not rule on the district court's assessment of the evidence. Instead, the panel concluded that the actionable conduct was not limited to the filing of the Putty Hill lawsuit or the latter complaint, as the jury had been instructed, but that maintenance of that lawsuit was a "continuing tort" and Toomey could be found liable if he prosecuted the suit with the intent to interfere with Whelan's reasonable business expectancies. The panel went on to find that there was evidence that Andrew Whelan's business opportunities "crystallized well before Abell and Toomey moved to dismiss the Whelans from the suit in October 1984" and that the "jury therefore *could have found* that [Toomey], *through the maintenance* of the Putty Hill lawsuit, *intentionally* interfered with Andrew Whelan's business opportunities. . . ." Slip op. at 19 (emphasis added). Based upon these assumptions, the panel reinstated the verdict in favor of Andrew Whelan.

Reinstatement of the verdict plainly was erroneous and denied Toomey a critical right. The jury was instructed that it could return a verdict for plaintiffs *only* if it concluded that defendants had sent the complaint letter and filed the lawsuit for the specific purpose of interfering with plaintiffs' business relationships at the time those actions were taken and that those relationships failed as a result of defendants' actions. Under the continuing tort theory adopted in the panel's opinion, the jury instructions would put different questions to the jury. Instead of being asked to determine Toomey's purpose in commencing the Putty Hill case and filing the letter, the jury would be asked to decide whether Toomey intentionally kept the lawsuit pending in order to interfere with Whelan's opportunities which matured after the lawsuit was filed. Toomey's knowledge of Whelan's business activities and the probability that those business ventures would succeed, were it

not for the lawsuit, would also have to be determined at time periods other than at the beginning of the Putty Hill case.[9] The jury was never asked to resolve those issues and Toomey was never given the opportunity to argue to the jury whether, based on the evidence, the jury could reach those conclusions.

Consequently, it was improper for the panel to reinstate the jury verdict. Reinstating the verdict turns on the panel's speculation as to what the jury *would have found if* the jury instructions had been based on the continuing tort theory adopted on appeal. A verdict cannot be upheld based on its conjecture as to what a jury might have found had it been properly instructed. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982).

CONCLUSION

For the reason stated, Toomey's petition for rehearing should be granted or, in the alternative, the Court should rehear Cases No. 90-7016 and 90-7018 *en banc*.

Respectfully submitted,

/s/ Theodore D. Frank

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[9] One of the issues not addressed by the district court in ruling on Toomey's motion for judgement n.o.v. was whether there was sufficient evidence that Toomey knew of these ventures to support the verdict.